

IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT BETWEEN THE PARTIES

In the matter between	)	)
	)	
HEALTH CARE WORKERS UNION	)	CMCS # ARB 03-2084
SEIU LOCAL 250	)	
	)	
and	)	ARBITRATOR'S
	)	OPINION AND AWARD
	)	
SUTTER ROSEVILLE MEDICAL CENTER	)	JULY 13, 2004
	)	
	)	
	)	
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APPEARANCES:

On behalf of the Employee Organization	On behalf of the Employer
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BEFORE:

Fred D. Butler  
ARBITRATOR

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I.

PROCEDURAL BACKGROUND

This arbitration arises pursuant to the agreement between the SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 250 (hereinafter referred to as the Union) and the SUTTER ROSEVILLE MEDICAL CENTER (hereinafter referred to as the Hospital), under which FRED D. BUTLER was selected as Arbitrator and under which this award is final and binding on the parties.

The matter involves the Hospital's denial of the Todd Pennington (hereinafter referred to as the Grievant) request for an increase in wages, based on his request to receive credit for prior work experience.

The Union filed a grievance on behalf of the Grievant, maintaining that the Hospital's action is a violation of the Collective bargaining Agreement. A Step 2 Grievance was filed on on or about December 17, 2001 and denied on March 29, 2002. A step 3 Grievance was filed on or about April 2, 2002 and denied on May 30, 2002. The matter was moved to arbitration on or about June 11, 2002.

An evidentiary hearing, wherein the parties availed themselves of the opportunity to call witnesses and present evidence and argument, was held at Roseville, California, on April 26, 2004. Witnesses were duly sworn. A verbatim record of the hearing was prepared, and a transcript was made available.

At the hearing the Hospital raised an issue related to timeliness of the grievance. The Arbitrator accepted evidence and testimony regarding this issue. After deliberation, it was determined that the matter was properly before the Arbitrator, time-lines having been waived.

II.

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issue to be determined.

Did Sutter Roseville violate Article 23.16 of the Collective Bargaining Agreement? If so, what is the appropriate remedy?

### III.

#### CONTRACT PROVISIONS

The terms of the relevant contract provisions, in pertinent parts, are outlined below.

#### ARTICLE 2. Management

##### 2.1 Management'S Rights.

The Employer retains, solely and exclusively, all the rights, powers, and authority which it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by an express provision of this Agreement. The rights, powers, and authority retained solely and exclusively by the Employer include, but are not limited to, the following:

To manage, direct, and maintain the efficiency of its operations and personnel; to manage and control its departments, buildings, facilities, and operations; to create, change, combine, or abolish jobs, departments, and facilities in whole or in part for economic and operational reasons; to discontinue work for economic or operational reasons; to direct the staff; to increase or decrease the staff and determine the number of employees needed; to hire, transfer, promote, demote, suspend, discharge, and maintain the discipline and efficiency of its employees; to lay off employees; to establish work standards, and require overtime; to assign work and decide which employees are qualified to perform work; to schedule and change working hours, shifts, and days off; to adopt rules of conduct and safety rules, and penalties for violation thereof; to determine the work to be performed and the services to be provided; to determine the methods, processes, means and places of providing services; to determine the location and relocation of facilities; and to effect technological changes.

#### ARTICLE 6.4 ARBITRATION.

The following procedure will apply if a grievance is appealed to arbitration:

##### 6.4.5 Arbitrator'S Authority.

The Arbitrator shall have no authority to (1) amend,

modify, change, add to, or subtract from any provision of the Agreement; (2) to base any decision on any practice or custom which is inconsistent with any provision of this agreement; (3) render an award on any grievance occurring before the effective date, or after the termination date, of this Agreement; (4) render an award that nullifies or abridges any management right specifically reserved to management by this Agreement.

The Arbitrator shall have no authority or jurisdiction other than to determine whether the Employer violated an express provision(s) of this Agreement and if so what is the appropriate remedy under the terms of the said Agreement. The arbitrators' jurisdiction shall be limited solely to the dispute submitted to him by the parties, and s/he shall have no authority or any jurisdiction whatsoever to issue any award of declaratory relief, prospective relief, or to decide any issue other than the one submitted by the parties to him/her.

#### 6.4.6 Burden of Proof.

Except in the case of discipline or discharge failure of the Union to satisfy the burden of proof requires the arbitrator to find on behalf of the Employer.

### ARTICLE 23. WAGES

#### 23.16 Credit for Experience for New Hires.

Persons hired into bargaining unit positions after 11/3/97 will be placed at Step 1 in the appropriate classification, except for new hires in Grades 6 through 9. The facility will consider these new hires years of experience when determining their assigned step, up to and including Step 3 as follows:

The Medical Center will credit experience in same or comparable positions in JCAHO accredited acute care hospitals based on the following schedule: with 0-3 years experience, the employees will be placed at Step 1; with 3-6 years experience during the last 7 years, the employees will be placed at Step 2; with 6 or more years of experience in the last 8 years, the employee will be placed at Step 3.

### IV. STATEMENT OF FACTS

Following is a summary of the findings of facts as determined

by the arbitrator based on the testimony.

The Grievant, Todd Pennington was hired by the Hospital in September 2001 in the position of Emergency Room Technician.(ERT)

The Hospital is an acute care hospital located in Roseville, California. It operates an emergency room for patients suffering from any type of emergency, ranging from minor injuries to life-threatening conditions, for example cardiac arrest, severe respiratory distress, or blunt and penetrating trauma. (RT 140-141) The Hospital is a Level 2 trauma center and is accredited by the American College of Surgeons to provide complicate trauma services beyond that which most emergency room departments are licensed to handle. (RT 141) The Hospital also maintains a helicopter pad, which enables rescue operations to transport trauma patients in emergency situations to the facility. (RT 98-99)

At the time of the Grievant's hiring, ERTs were required to have a high school diploma or equivalent and certification as an Emergency Medical Technician(EMT) or Nursing Assistant. (NA) (See Union Ex-3, Mgt Ex 3 & 4)

The EMT training teaches individuals the appropriate procedure to respond to emergencies and act as a paramedic in an ambulance. (RT 145-146). There are various levels of training and certifications of EMT I and EMT II.

In March 1998 the position description for the position of ERT required that applicants posses either an EMT Certification or a NA Certification. However, in August 2000 the position description required that the ERT possess certification as an EMT 1, EMT 2 or EMT Paramedic. The Nursing Assistant language was removed by Catherine Ross, Director of Critical Care and the supervisor of the ER Department (RT 147)

Ms. Ross made this revision after assuming the Director's position because she realized that the employees who were assuming the ERT position with only nursing aide backgrounds, without EMT certifications and were not able to function at the required level. The Hospital advised the Union of this change in a letter dated September 12, 2000. (Mgt Ex. 5) The Hospital also sent a copy of a job specification dated July, 2001 (Union Ex. 2)

As outlined above, the Grievant was hired as an ERT on or about September 14, 2001. Prior to that the Grievant was employed as an ERT for Marin General Hospital for one year and nine months.

Marin General is a JCAHO accredited acute care hospital. There is no dispute that Grievant's duties as a ERT at Marin General were similar to the duties performed at the Hospital.

The Grievant also worked as a NA for four years and nine months at California Pacific Medical Center, (CPMC) also, a JCAHO

accredited acute care facility. At CPMC, while serving as a NA the Grievant was assigned to the intensive care unit. He was also part of the "code blue" team to assist when someone needs cardio-pulmonary resuscitation (RT 90)

The Grievant also has training and experience as a firefighter. He has a certificate of training as an NA and as an EMT 1. (RT 82-84)

Prior to the time that the Grievant was hired, there were no NAs hired from outside of the Hospital that were awarded positions in the emergency room. The only persons that had NA backgrounds that came to ERT positions at the Hospital were in-house transfers. (RT 150)

In addition, from time to time, the emergency room had NAs float through the ERT position when the hospital is short staffed. (RT 169) However they function as an N/A unless they are qualified as an EMT and have a secondary job classification as an ERT. In those cases they are classified as such and receives ERT wages. (RT 171-172)

At the time of the 2000 change in the job descriptions, some NAs, who were already on staff were grandfathered into ERT positions without the necessary certifications and none were terminated for lack of EMT Certification. (RT 201) However even with additional training some of these individuals were not able to perform as ERTs and were offered other positions outside of the emergency room. (RT 201)

Upon the offer of employment at the Hospital, the Grievant expressed concerns about his starting salary. More specifically, the Grievant inquired about receiving credit for his prior experience. (RT 15) He believed that the experience he had as an NA at CPMC should be considered comparable to the ERT position for purposes of an increase in his entry level steps. He had more than one year's experience at Marin and more than four years' experience at CPMC which he claimed would give him more than six years experience and qualify him for entry at the Step 3 level.

The Grievant made this inquiry again on November 14, 2001 through his Supervisor shortly after his hire. He was told in either late November or early December, after a second discussion that the information that he presented did not show that he was eligible for prior experience credit. At that time there was no detailed discussion of the specifics regarding this experience. (RT 131-132) Other than the initial application for employment and the CPMC job specification which was not submitted until after the Step 2 grievance decision, the Grievant did not present detailed information to the Hospital about his former position. (RT 122-125)

On December 17, 2002, the Union filed a Step 2 Grievance in this matter, which was heard through Step 3 and denied. The matter was then referred to arbitration.

V.  
POSITION OF THE PARTIES

Union's Position

It is Union's position that the Grievant should have been elevated to Step 3 of the salary range for ERTs based on comparability of the work that he performed in his prior positions.

More specifically the Union maintains that, in comparing the eighty-six functions performed as an ERT at the Hospital, the Grievant performed 82 of those functions as a NA at CPMC. Therefore, he performed 93% of the required ERT job tasks.

The Union also maintains that the job specification dated July 2001 sent to them from the Hospital in response to a document request, confirms this comparability by allowing an applicant to qualify for the ERT position by possessing either an EMT Certification or NA Certification. Therefore they maintain that the Hospital has conceded that the positions are comparable.

Further evidence of this comparability is indicated by the Hospital's policy of "grandfathering " NAs with no EMT certifications into the ERT position. The Hospital does not dispute this. The Union maintains that this was done because the NA position was comparable and the NA's were able to perform in that position without the certification. In addition the Hospital floats NAs into the emergency room at least twice per month, where they perform ERT functions.

Finally it is the Union's position that the Hospital is attempting to make the contract language moot by claiming that there are no other hospital positions that are comparable to the ERT position. In doing this the Union contends that the Hospital is attempting to substitute the word "same" for "comparable."

Thus, the Grievant claims that he was able to perform his duties as an ERT without any substantive training. He was able to do so because of his experience as a NA.

Based on the above the Union requests that the Grievance be granted and that the Grievant be made whole.



### Management's Position

It is Management's position that it did not award credit experience to the Grievant because the position of NA and the position of ERT are totally different and "are in no sense the same or comparable." In this regard they contend that the Union cannot overcome its burden to present evidence to the contrary.

The Management rights clauses of the Contract provide that Management specifically has the discretion to establish work standards and to decide the qualifications of its employees. They contend that nothing in Article 23.16-or any other provision for that matter-abridges this right.

Management also points out that the Union does not challenge the Hospital's discretion to determine the minimum qualification of its positions, nor does it appear to contest that the Hospital has the discretion to determine when positions are comparable within the meaning of Article 23.16.

The rationale for the Hospital changing the job specification in year 2000 was to acknowledge that the practice of placing NAs into ERT positions was not in the best interest of the Hospital or patient care because the NA's were not qualified to perform the ERT Job.

After a review and comparison of the duties outlined in the job specifications of the NA position at CPMC and the ERT position at the Hospital, it was determined that, when the ERT is assigned to the trauma resuscitation room or the rapid medical evaluation area, 90% of the time spent by ERT is performing duties that the NA is not required or qualified to perform. When the ERT is assigned to the general area of the emergency room, approximately 60% of the ERT time is spent on duties that a NA does not perform.

The Hospital has also identified and presented a list of duties that they believe are crucial to patient care that cannot be performed by the NA.

The Hospital acknowledges that the NA at CPMC must respond to emergency situations, for example "Code Blue." However, in performing these duties under Code Blue, an NA would only be required to know how to begin rescue breathing and chest compression, not all of the other trauma-related duties required of the ERT.

The Hospital also acknowledges that from time to time, when it is short staffed, NAs are asked to float into the emergency room to assist the ERT and perform some of their duties. However, the NAs are only allowed to perform those functions that he or she is qualified to perform, for example taking critical signs or undressing patients. In addition, there are NAs who, because

there are no benefitted positions available as a ERT work for the Hospital in a secondary job classification as an ERT.

Finally it is the Hospital's position that the Union bears the burden of proof in this matter and are offering nothing to contradict the Hospital's discretion to determine the appropriate credit given to the Grievant. Further that the Union has offered no evidence other than the testimony of the Grievant to demonstrate that the duties performed as a NA at CPMC are comparable to the duties he performed at the Hospital.

The Hospital maintains that the Grievant's testimony about his duties at CPMC are self serving and cannot be verified. In addition, his testimony, for the most part, support the Hospital's position. For example, the Grievant admitted that the NAs do not perform many of the duties performed by the ERT.

Finally the Hospital maintains that the position description sent to the union was a clerical error. This they contend is verified by the testimony of Catherine Ross, who states that she is the only person authorized to draft the position description and the job description sent to the union was not the correct one.

The Hospital contends that even if the position sent to the union had been in effect, this has no bearing on whether the Hospital would have allowed credit for the Grievant's experience as a NA because the Hospital has never awarded credit to ERT for their prior experience as a NA. Therefore, they maintain that not awarding credit has been adopted as a "past practice" based on the fact that the practice has never been challenged, therefore Article 26.13 has never been interpreted to allow ERTs to receive pay credit for prior NA experience.

Finally, the Hospital maintains that the parties in contract negotiations have recognized that the NA and ERT positions are not comparable. This is based on the fact that the contractual pay grades for NAs and ERT's are different. I.e., ERT's are compensated at a higher grade level. Thus the Hospital argues that the Union cannot, now, through the grievance and arbitration procedure, attempt to obtain from the Arbitrator a result that they have been unable to obtain through multiple contract negotiations.

Therefore, the Hospital requests that the Grievance be denied.

## VI. DISCUSSION

Article 2.1 of the Collective Bargaining Agreement reads in

pertinent parts "The Employer retains, solely and exclusively, all the rights, powers, and authority which it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by an express provision of this Agreement. . . ."

Article 23.16 states in pertinent parts " The Medical Center will credit experience in same or comparable positions in JCAHO accredited acute care hospitals based on the following schedule: with 0-3 years experience, the employees will be place at Step 1; with 3-6 years experience during the last seven years, the employees will be placed at Step 2; with six or more years of experience in the last eight years, the employee will be placed at Step 3. . . "

Arbitrators may differ on the use of the term "abridged." However when used in this context and under the terms of the contract, Section 23.16 does appear to limit the Hospital's discretion as it pertains to whether credit experience in the same or comparable positions will be given. Therefore, notwithstanding the rights identified in Article 2, the Hospital is obligated to follow the directive of this particular section.

There is no dispute that Management has the responsibility to manage, direct, and maintain the efficiency of the operations and in that regard has not only the right but the obligation to establish qualifications for the various positions to accomplish that task. Nothing in the matter before this Arbitrator appears to challenge that obligation or right.

The question before this Arbitrator is whether Management, in exercising that right, violated that section of the contract that expressly places a limit on its discretion.

In order to address that question there has to an examination of the question of whether the position of NA and ERT are the same or comparable.

After reviewing the contract, there are no definitions of the terms "same" or "comparable" and there was no evidence submitted to identify the intent of the parties when using these terms. Therefore, this Arbitrator will give the plain meaning to these terms as identified in Webster's New American Dictionary, 1995 Version. The definition of "same" in Webster's dictionary is "identical."

There was no claim by the parties that the positions were identical. In addition, there was ample testimony on both sides to suggest that these two positions, in their generic forms are not the same.

The definition of "comparable" in Webster's dictionary is

"being similar or about the same." The Hospital's position is that, when reviewing the duties of an NA and an ERT, the positions do not meet this definition. In reviewing the job specifications in the NA position at the CPMC, and the ERT position at the Hospital one could easily come to the conclusion that the duties outline in these job descriptions are not comparable. (See JT. 3 and Union 4 respectively)

In addition, Ms. Ross, Director of Critical Care at the Hospital, who has been in the field of Nursing and Health Care for thirty-six years, testified credibly that the NA position is "an unlicensed, uncertified position in which they can perform certain limited functions in the care of patients. That includes assisting patients in activities of daily living,; helping them brush their teeth, bathing them, helping with their toileting, changing linen on the beds and taking vital signs. NAs are not able to make independent decisions and work under the direction of a registered nurse or LVN." (RT 150-151)

Ms. Ross also testified credibly that EMT's "respond in the field to accidents or scenes or homes where people may be in distress or have an injury or illness. And they are taught how to safely move a patient from one place to another, to recognize if there are broken bones, or support breathing, as far as properly positioning the patient when they are making moves. . . They receive patients in wheelchairs and on gurneys, not in care." (RT 152-153)

Ms. Ross testified that the position of ERT is much more involved and can also require that the ERT for example, bring patients, that can walk from the lobby, into the bed area into the direct care of the charge nurse or one of the staff and put them on a gurney. Help remove their clothes , take initial vital signs and do basic vital sign collections. In addition to doing EKG, they provide basic kinds of care for the comfort of the patient.

In the trauma resuscitation room, the ERT has basic responsibilities and needs to function independently so that they can get their part of the job done at the same time the nurse and physician are doing their basic job. The ERT does splinting for extremity fractions. They apply splints and immobilizers. They are also responsible for going to the helicopter pad to retrieve patients that are coming in by air and they are trained on how to do that safely. They are also responsible for washing and cleaning lacerations so that the physician can suture them.<sup>1</sup> According to Ms. Ross, these are tasks that a NA is not trained to do.

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<sup>1</sup>More detailed job specifications are outlined in Union Ex. 2.

This difference in the duties and responsibilities at the Hospital is assumably the rationale behind the difference in grade level and salaries assigned to each of the positions. The ERT is set at level higher than the NA.

According to the job specification provided to the Union as a result of a document request, which is determined to have been in effect at the time of the Grievant's hiring, individuals with experience as a NA can apply for the ERT position. This may have been the motivation for the Grievants' initial and ongoing request for credit for past experience. This job description came from Human Resources Department, the section of the Hospital responsible for recruiting and interviewing initial candidates and is dated July, 2001.

The Hospital stated that this is a moot point and it does not matter which job specification was in effect because the Hospital has never given credit for prior experience to NA's placed in the ERT position. They take the position in their post hearing brief that the failure to grant credit is a "past practice."

The issue of "past practice" is not before this Arbitrator. It was not specifically raised at the hearing nor was there ample time given to discuss that issue.

Suffice it to say that "past practice" is often misunderstood. The test for determining a "past practice" requires much more than was presented here and at a minimum there must be mutual acceptance and reciprocity over a period of years so that both parties accept the practice as part of the routine. That does not appear to be the case here, as demonstrated by the Grievance.

The Hospital testified that, prior to hiring the Grievant, they did not hire NAs from outside of the hospital. (RT 150) Because the Grievant was the first outside NA to be hired as a ERT, the Hospital may have not had to deal with the issue of prior credit for work experience until his request.

In addition, in reviewing the grade levels of NAs and ERT's, for example an in house NA with two years experience at the Hospital is already above the entry level of an ERT. Therefore transferring an existing NA should not have required awarding credit for prior experience and should not have been an issue. This would have been satisfied under the wage grid. (See CBA, Appendix C)

Because we are not just dealing with the job duties at the Hospital, the analysis cannot stop here. The Grievant testified that, while at CPMC serving in the position of NA he performed a

number of duties that were the same as others that were comparable to the ERT duties at the Hospital.

In reviewing the testimony of Ms. Ross, she acknowledged that NAs at the Hospital, from time to time, also performed ERT duties.<sup>2</sup>(RT 170-172) In addition, Ms. Ross testified that NAs at the Hospital were grandfathered into ERT positions without further certification.

The statement of Ms. Ross appear to establish that NAs have been used interchangeably with ERTs at the Hospital. It is reasonable to assume that, if this can occur at a Level 2 trauma center such as the Hospital, then this or some similar process or procedure could have existed at CPMC whereby NAs were used in this capacity, without changing their job title or basic job duties.

If so and the Grievant could demonstrate that this was in fact the case, then he would have been eligible to have this experience evaluated for a determination of experience credit in determining his entry grade level.

To determine whether ERT's and NA's duties are comparable depends on the task assigned to each and to the facility to which they are assigned. For example, a NA assigned to the emergency room is more likely to perform duties similar or comparable to an ERT. However, a NA assigned to a hospital ward would not.

It is in this context that the grievance should be evaluated. The title of the position, in this case is not conclusive. In instances such as this, an evaluation of the actual duties performed is more appropriate.

At the hearing the Grievant testified that, in his prior position as an NA he performed all but four of the task that he performed while serving as an ERT. The Hospital, on the other hand states that in some instances 90% of the task that an ERT performs at the Hospital are not performed by an NA and, in others, 60% of the task are not performed by an NA.

It is the Union's and the Grievant's burden of proof in this matter.

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<sup>2</sup>Ms. Ross testified that "there are some nursing assistants who wish to work in the emergency department, but they, for instance , ma need a benefitted position. . .So they may take a nursing assistant position on the in-patient unit and then work for us as secondary job classification as an emergency department technician." . . . Q. "But because they are qualified to perform a an ERT Tech, when they float to the ER department they can do all the things that an ER Tech does; is that correct?" A. Yes.

The Grievant had several opportunities to present competent evidence to show that the duties he performed at his CPMC were the same or comparable to the duties at the Hospital. He did not provide this information in his application for employment, in the discussions with the Hospital or in any written information until just before the Step 3 Grievance hearing. At that time, the only thing that he presented was the CPMC NA job description. This job description does not demonstrate sufficient similarity or comparability between the NA position and the ERT position at the Hospital.

In order to have satisfied this burden, the Union could have presented sworn declarations from the CPMC or testimony from that employer attesting to the similarity of the tasks performed and comparing the duties and establishing to the similarities. In that way the Hospital would have had a basis under the contract to credit a portion, if not all, of the prior experience toward the Grievant's wage rate.

The only evidence presented by the Grievant was the CPMC job specification and his verbal testimony. His testimony embellishes and adds duties and task to this job specification. That is not permissible as the CPMC job specification is the official document from that organization for purposes of establishing the duties and task of a given position. Without more from that organization, it is the "best evidence" of same for the purpose of this arbitration.

While it is possible that the Grievant did perform additional duties while at CPMC that would have entitled him to receive credit experience, he did not present sufficient evidence to prove this claim.

Therefore the Union and Grievant did not demonstrate that the Grievant was entitled to receive credit for his experience while working as an N/A at CPMC. Therefore they did not meet their burden of showing that the Hospital is in violation of Article 23.16 of the CBA.

Article 6.4 of the CBA requires "Except in the case of discipline or discharge, failure of the Union to satisfy the burden of proof requires the arbitrator to find on behalf of the Employer."

#### VII. AWARD

The Grievance is denied.

Dated:

FRED D. BUTLER, Arbitrator